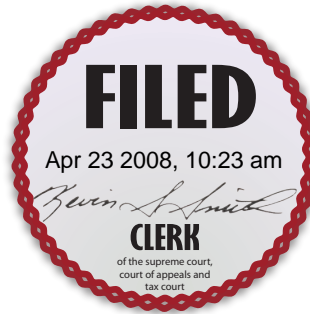


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MARRIAGE OF
CHRISTOPHER MARK KINCAID,

Appellant-Respondent,

VS.

SHELLEY RAE KINCAID,

Appellee-Petitioner.

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No. 32A04-0708-CV-452

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0306-DR-87

April 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Christopher Mark Kincaid appeals the trial court's calculation of child support. Because two of the court's findings of fact are clearly erroneous, we reverse and remand for the court to re-determine Christopher's weekly income and recalculate support using corrected incomes for both Christopher and his ex-wife, Shelley.

FACTS AND PROCEDURAL HISTORY

The parties married on June 4, 1985. They have four children born between 1990 and 1993. In 2003, Shelley filed a petition for dissolution of marriage. The court approved a final settlement agreement on June 5, 2005. That agreement set Christopher's child support obligation at \$133 per week.

On October 27, 2006, Christopher petitioned for modification of child support due to changes in income, childcare costs, and insurance. The court heard evidence on May 2, 2007, and then the parties submitted proposed findings and conclusions. On May 11, 2007, the court reduced Christopher's weekly support obligation to \$102. Christopher moved to correct errors in that order. The court denied his motion.

DISCUSSION AND DECISION

Christopher challenges a number of findings underlying the court's calculation of his child support obligation. When reviewing the court's findings and conclusions, we consider whether the evidence supports the findings and whether the findings support the judgment. *Ratliff v. Ratliff*, 804 N.E.2d 237, 244 (Ind. Ct. App. 2004). "In order to determine that a finding or conclusion is clearly erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made." *Id.*

We note that Shelley did not file an appellee's brief. In this situation, we may reverse the trial court's decision "if the appellant makes a prima facie showing of reversible error." *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004).

We also note the court adopted Shelley's proposed findings and conclusions without modification.¹ When a court accepts one party's findings verbatim, it leads to "an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." *Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001). That the court did not even retype the findings "leaves us with an even lower level of confidence that all findings reflect the independent evaluation by the trial court." *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 273 n.1 (Ind. 2003).

Christopher asserts the court erroneously determined his and Shelley's incomes. We will not reverse the court's calculation of income for each parent unless it is clearly erroneous. *Naggatz v. Beckwith*, 809 N.E.2d 899, 902 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 974 (Ind. 2004). If the calculation includes the forms of income our Child Support Guidelines require to be included and falls within the scope of the evidence presented at the hearing, we will not find clear error. *Id.* at 903.

The court found Shelley's income is \$1092.00 per week. That finding is clearly erroneous. All the evidence in the record indicates Shelley's income is \$62,000.00 per year, or \$1192.00 per week. (*See* Tr. at 34-35, 37, 45.)

The court found Christopher's income is \$1072.00 per week. It is apparent the

¹ The court marked out two words, "Mother's Proposed," in the title, such that the title became simply "Order on Child Support Modification." (App. at 10.)

evidence supporting that finding is the result of a mathematical error by Shelley's counsel:

Q Mr. Kincaid you say you earn, uh, eight hundred and seventy-nine dollars a week but you have overtime do you not?

A Yes, I do.

Q When I look at your current pay stubs that you provided it looks as though through the first two months of 2007 that you earned eight thousand five hundred eighty-two dollars is that correct?

A Whatever – whatever it – it says, yeah.

Q And if I divided that by the number of weeks I get a figure close to a thousand dollars a week.

A Whatever your math says. I – I don't know.

Q So are you saying that it's possible that your income is a thousand dollars a week?

A I'm saying, uh, my income varies. I'm an hourly employee. I get sometimes overtime, sometimes not.

* * * * *

Q Have you had any overtime in April?

A Yes, I make about two to four hours of overtime a week.

Q And do you make approximately thirty dollars an hour for the overtime?

A Yes, that's true. That's true at this point.

Q So if you average three dol – three hours of overtime a week times thirty dollars an hour you get two hundred and seventy dollars a week average in overtime plus \$20.63?

A Twenty dollars and six cents I believe it is.

Q (Interposing) And six cents. And if I added up \$270.00 and 802.00 I would get a thousand seventy two dollars a week would I not?

A Sounds about right.

* * * * *

Q Okay. So if I add the \$270.00 for the average overtime which is three hours and your \$802.00 regular per week that's a thousand seventy two is it not?

A Yes, it is.

(*Id.* at 28-32.) As Christopher notes, counsel made a mathematical error at the beginning of her questioning, when she multiplied his three hours of overtime by thirty dollars per hour and asserted he earned “two hundred and seventy dollars a week average in overtime.” (*Id.* at 30.) Three hours at thirty dollars per hour is ninety dollars a week on average in overtime. Accordingly, we must find clearly erroneous the income assigned to Christopher.²

The remaining evidence of Christopher's income is conflicting. If we add \$90.00 in overtime to \$802.00 in regular wages, Christopher's income appears to be \$892.00 per week. But his March 8, 2007 pay stub indicates he had made \$8582.19 in nine weeks, for an average of \$953.58 per week. His March 15, 2007 pay stub indicates \$9435.70 in ten weeks, for a weekly income of \$943.57. His March 22, 2007 pay stub shows income of \$10,314.24 in eleven weeks, for an average of \$937.66 per week. Accordingly, we

² The only other testimony in the record supporting a finding of \$1072 per week for Christopher came from Shelley, when her counsel asked: “But you believe his income is, uh, a thousand seventy-two a week do you not?” (Tr. at 37.) Shelley's response was, “Yes.” (*Id.*) As she offered no facts to support her belief, we presume it was based on her own counsel's erroneous calculation when questioning Christopher.

remand to the trial court to consider and weigh the evidence to determine a weekly income for Christopher.

Finally, Christopher challenges the court's finding of the number of overnights the children spend with him each year for purposes of calculating his parenting time credit. Shelley testified the number of overnights the children spend with him is between 110 and 145. Accordingly we cannot say the finding of 127 overnights is clearly erroneous.

Nevertheless, both Shelley and Christopher testified he consistently has the children three overnights every week. (*See id.* at 20, 39) (Shelley testifies he has three nights a week with the children, so he should receive "[w]hatever that multiplies out to be.").³ She claimed the children occasionally came home on Sunday for family events, while he claimed a few extra days due to Shelley's obligations to other family. As the court must review the record to enter a new finding as to Christopher's income, we suggest it review the record to determine whether it would have selected 127 as the number of overnights if it had not summarily adopted Shelley's proposed findings.

We reverse the court's calculation of child support and remand for the court to enter new calculations supported by the evidence.

Reversed and remanded.

VAIDIK, J., and MATHIAS, J., concur.

³ Three nights each week is 156 nights per year.